(18)

No. 91-913

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

JOHN R. PATTERSON,
Petitioner,
v.
JOSEPH B. SHUMATE, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the American Society of Pension Actuaries ("ASPA") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to affirm the decision below that a debtor's interest in an ERISA tax-qualified pension plan is excluded from property of the debtor's bankruptcy estate under 11 U.S.C. § 541(c)(2). ASPA also respectfully urges this Court to hold that the anti-alienation provisions in ERISA and the Internal Revenue Code, 29 U.S.C. § 1056(d)(1) and I.R.C. § 401(a)(13)(A), constitute "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), as well as "Federal law" under 11 U.S.C. § 522(b)(2). In addition, ASPA respectfully

urges this Court to hold that the antialienation provisions in ERISA and the Internal Revenue Code protect all pension benefits from all ERISA tax-qualified plans, without regard to a pension plan participant's economic stature or employment status. Respondent has consented to the filing of this brief; Petitioner has not.

ASPA is a nonprofit organization whose purpose is to educate pension plan professionals and to preserve and enhance the private pension system. The membership of ASPA consists of nearly 3,000 individuals who provide actuarial, consulting, and administrative services to approximately 30% of the tax-qualified retirement plans in the United States. The members of ASPA, like the pension plans they serve, are located throughout the United States. These plans are representative of all of the nation's tax-qualified retirement plans, which cover tens of millions of American workers. Reversal of the decision below will have an adverse impact on all tax-qualified pension plans, including those plans served by ASPA's membership.

Because of the broad range of experience of ASPA's constituency and its close, ongoing contacts with thousands of fiduciaries charged with operating retirement plans and thousands of large and small businesses that maintain these plans, ASPA believes that it is uniquely qualified to state the position of those who maintain and administer these plans, as well as the participants and beneficiaries of these plans.

In the instant case, we respectfully request this Court to affirm the decision below that retirement plan assets are meant to provide benefits to plan participants when they retire, not to be assigned to retirees' creditors in bankruptcy court. Reversal of the decision below would have far-reaching negative consequences for the effective administration of retirement plans and would undermine the retirement system that Congress has sought to bolster through the passage of the Employee Retirement Income Security Act of 1974 and subsequent amendments thereto.

ASPA will limit its discussion to the consistency between the decision below and the legislative histories of ERISA, the Retirement Equity Act of 1984, and the Bankruptcy Code priority for employee benefit plans—matters not addressed by the parties. ASPA's brief focuses on the Congressional intent to ensure that retirement benefits would be provided, not lost, in times of economic hardship.

Based on the foregoing, ASPA respectfully moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Dated: April 1992

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

INTRODUCTION

The American Society of Pension Actuaries ("ASPA") submits this brief *amicus curiae* to urge the Court to affirm the holding below that bolsters the fundamental premise upon which pension plans are established and administered: that the assets of tax-qualified pension plans cannot be assigned or alienated to a plan participant's creditors.

INTEREST OF ASPA

The nature and purpose of ASPA is set forth in the accompanying motion for leave to file this brief. ASPA submits that a failure to affirm the decision below will undercut the purpose and structure of retirement plans.

To adopt the position of the Petitioner is to reject the Congressional directive to encourage the establishment and maintenance of pension plans to provide pension benefits to plan participants. *See* 29 U.S.C. §§ 1001, 1104(a)(1)(A).

The Congress, familiar with the way in which retirement plans operate, enacted ERISA in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans," 29 U.S.C. § 1001(a). Neither in ERISA nor its subsequent amendments did Congress choose to make retirement plan assets available to pay plan participants' creditors. The corpus of a tax-qualified retirement plan is maintained to provide benefits for all plan participants—whether they are highly compensated or rank and file. As a national representative of those who provide services to retirement plans, ASPA submits that reversal of the decision below would impair the viability of all retirement plans.[1]

SUMMARY OF REASONS FOR AFFIRMANCE

The legislative history of the Employee Retirement Income Security Act evidences an overriding Congressional concern that a pension plan participant's actual receipt of earned retirement benefits should not be subjected to the winds of financial misfortune. *See* 29 U.S.C. § 1001(a). This intent is expressly embodied, among other places, in ERISA's minimum vesting and funding requirements, 29 U.S.C. §§ 1053 and 1082, as well as ERISA's express prohibition against the alienation of pension benefits, 29 U.S.C. § 1056(d). The protections against alienation, which ERISA affords to pension plan participants' benefits, are not limited to the benefits of rank and file employees, highly compensated employees, and/or substantial owners, even though Congress saw fit to distinguish among these kinds of pension plan participants for other purposes, *e.g.*, 29 U.S.C. §§ 1322(b)(5), 1342(a)(3) and I.R.C. § 401(a)(26).

The Congressional concern that pension benefits must be funded so that participants will actually receive benefits, is reiterated in the legislative history of the Bankruptcy Reform Act of 1978 and reinforced through that statute's express provisions, 11 U.S.C. § 507(a)(4). Since the passage of ERISA in 1974, Congress has only once chosen to modify ERISA's prohibition against the alienation of pension benefits, which Congress refers to as ERISA's "spendthrift" rules. That choice was made in 1984 under the Retirement Equity Act, which permits the alienation of benefits for spousal support and maintenance under certain limited circumstances. Congress has not chosen to legislate the alienation of pension plan assets for the benefit of pension plan participants' creditors. We respectfully submit that this Court should not do so, either.

[1] Counsel has been authorized to represent to the Court that the National Coordinating Committee for Multiemployer Plans ("NCCMP") supports the positions espoused by ASPA in this brief. The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interest of multiemployer pension and welfare plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws affecting employee benefits. Currently, more than 190 multiemployer plans (and related international unions), which plans are representative of all of the nation's multiemployer plans covering more than nine million workers, are affiliated with the NCCMP.

REASONS FOR AFFIRMANCE

ASPA respectfully requests that this Court consider the legislative history of ERISA (and subsequent amendments thereto) and the legislative history of Section 507 of the Bankruptcy Code, which demonstrates a Congressional intent to ensure that retirement benefits are actually paid to retirement plan participants. While we concur with the position espoused by the Respondent, in

compliance with the spirit and letter of this Court's Rule 37, we seek affirmance of the decision below by bringing to the Court's attention information not presented by the parties.[2]

LEGISLATIVE HISTORY OF ERISA

The Employee Retirement Income Security Act of 1974 was forged in the fire of business failure, most notably that of the Studebaker Division of Studebaker Packard, when more than 4,000 workers lost their jobs and got only 15% of the pensions they had earned. I *Legislative History of the Employee Retirement Income Security Act of 1974*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Comm. Print 1976) (hereinafter "Legis. Hist." ——) at 208 (remarks of Sen. Ribicoff). An additional 2,900 Studebaker employees were left with absolutely nothing. I Legis. Hist. at 214 (remarks of Sen. Bentsen). The legislative history of ERISA brims with the tragedy of individual ruin resulting from the loss of pension benefits. S. Rep. No. 127, 93d Cong., 1st Sess. at 9-10, *reprinted in* I Legis. Hist. at 595-96. ERISA's "basic goal is to assure workers that they will receive the promised pension benefits earned for their retirement. . . ." II Legis. Hist. at 1599 (remarks of Sen. Williams) describing, *inter alia*, the loss of not only jobs, but also pensions when Raybestos shut down).

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[2] If this case and the issues presented are to turn on the plain statutory language, there is no question but that Respondent prevails, because ERISA and the Internal Revenue Code (including their provisions prohibiting the alienation of retirement benefits) are "Federal law," 11 U.S.C. § 522(b)(2)(A), and are "applicable nonbankruptcy law," 11 U.S.C. § 541(c)(2). However, the parties and the federal courts, which have addressed these issues, have gone beyond the plain language, even though some have remembered to return to it.

Under ERISA and the Internal Revenue Code, Congress intended to ensure that participants would receive the benefits they earned through required minimum vesting and funding rules. "To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated. (Of course, this provision is not intended to prevent the transfer of benefit rights from one qualified plan to another)." H. Rep. No. 779, 93d Cong., 2d Sess. at 66, *reprinted in* II Legis. Hist. at 2655.

This legislative history describing the purpose of the antialienation provisions in ERISA and the Internal Revenue Code was repeated throughout the legislative consideration of ERISA. *E.g.*, H. Rep. No. 807, 93d Cong., 2d Sess. at 68, *reprinted in* II Legis. Hist. at 3188; Explanation of H. Rep. 12906 to accompany H. Rep. 2, *reprinted in*, II Legis. Hist. at 3323. Further elaboration on the antialienation provision evidences the Congressional "understand[ing] that many plans provide for payments of premiums for supplemental hospital benefits (under the Social Security Act) and this provision is intended to specifically permit such alienation." H. Rep. No. 779, 93d Cong., 2d Sess. at 67. Similarly, "[t]his provision is not intended to interfere with the current practice in many plans of using vested benefits as collateral for reasonable loans from the plans." *Id.*

Nowhere in ERISA or its legislative history is there a hint that there was any intent to establish a practice that employee benefits should be assigned or alienated for the benefit of a participant's creditors. To the contrary, "[t]he primary purpose of the bill is the protection of individual pension rights. . . . In addition to the minimum participation, vesting, and funding standards provided in the bill, your committee has adopted a number of specific provisions to protect the rights of employees nad [sic] beneficiaries under qualified plans. . . . Quali-

fied plans must provide that retirement benefits may not be assigned or alienated. . . ." Report of Committee on Education and Labor to accompany H. Rep. 2 (Cong. Rec. Feb. 25, 1974), *reprinted in* II Legis. Hist. at 3294.

In the same vein, Congress intended that "no rights, once they are required to be vested, may be lost by the employee under any circumstances. . . . Some plans also provide that an employer may have lien rights against an employee interest in a pension plan. These clauses would also be prohibited. . . ." *Id.* at 3327.

Finally, the Joint Explanatory Statement of the Committee of Conference on ERISA states: "[A] plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10% of any benefit payment) by an employee. . . . For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. at 280.

In addition to ERISA's and the Internal Revenue Code's antialienation provisions, ERISA requires that plan fiduciaries use plan assets "for the exclusive purpose of providing benefits to participants and their beneficiaries," ERISA § 404(a)(1)(A)(i). Nowhere in ERISA or its legislative history is there a hint that Congress wanted to ensure that participants received their pension benefits even if their employer suffered financial failure, but that Congress did not want participants to receive their pension benefits if they suffered personal financial failure.

Nowhere in the findings and declaration of policy of ERISA, 29 U.S.C. § 1001, is there any evidence that Congress intended to ensure that retirement benefits would accrue, vest, and be funded for the benefit of a pensioner's creditors.

THE LEGISLATIVE HISTORY OF THE BANKRUPTCY REFORM ACT

In drafting the Bankruptcy Reform Act of 1978, Congress reiterated its concern that employee benefit plans be funded so as to be able to provide promised pension benefits. Bankruptcy Code Section 507(a)(4) "overrule[d] *United States v. Embassy Restaurant*, 359 U.S. 29 (1959) which held that fringe benefits were not entitled to wage priority status. The [Bankruptcy Reform Act] recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans. . . ." S. Rep. No. 989, 95th Cong., 2d Sess. at 69, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855. It defies logic to conclude that Congress intended with one hand to create a bankruptcy priority to fund pension plans (at the expense of nonpriority general unsecured creditors), thereby ensuring adequate assets to provide retirement benefits, while with the other hand it was taking those retirement benefits and redistributing them to the retiree's creditors. Federal statutes should be construed harmoniously, *Morton v. Mancari*, 417 U.S. 535, 551 (1974); they should be read as an integrated whole, not as isolated parts, *United States v. Morton*, 467 U.S. 822 (1984).

LEGISLATIVE HISTORY OF THE RETIREMENT EQUITY ACT

The Petitioner, like those federal circuits which do not find Bankruptcy Code Section 541(c)(2) to mean what it says, makes much of the reference to "spendthrift" trusts in the legislative history of the Bankruptcy Reform Act of 1978. However, those courts and the Petitioner overlook the fact that Congress had concluded that the antialienation provisions in ERISA and the Internal Revenue Code, in fact, were "spendthrift"

provisions. "Generally under present law, benefits under a pension . . . plan are subject to prohibitions against assignment or alienation. . . . A plan that does not include these required spendthrift provisions is not a qualified plan under the [Internal Revenue] Code. . . . The [C]ommittee [on Finance] believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances [involving qualified domestic relations orders for support and/or maintenance]." S. Rep. No. 575, 98th Cong., 2d Sess. at 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2564-65.

In establishing the antialienation or federal "spendthrift" rules under ERISA in 1974, and in establishing a limited exception of those rules under the Retirement Equity Act of 1984, Congress did not distinguish among plan participants—that is, the rules applying to rank and file participants as well as to salaried participants; the rules apply to solvent participants as well as to insolvent participants. Congress has chosen to differentiate for certain purposes among highly compensated employees and collectively bargained employees, *e.g.*, I.R.C. §§ 401(a)(26) and 410(b), and to differentiate between participants who are substantial owners and those who are not, *e.g.*, ERISA Sections 4022(b)(5), 4042(a)(3), and 4043(b)(7). However, Congress has not made that distinction with respect to the federal antialienation/spendthrift policy, expressed in the provisions of ERISA and the Internal Revenue Code. "If exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 376 (1990).

Congress has not chosen to establish a policy that would deny pension benefit protection for the owners of small businesses, but would extend that protection to the executives and significant shareholder employees of large corporations. Similarly, Congress has not chosen to establish a related policy that would result in the disqualification of pension plans established or maintained by small businesses simply because the owner, who is also a pension plan participant, was in financial distress and had to seek relief under the Bankruptcy Code. We respectfully submit that neither should this Court establish such a policy.

In *Guidry*, this Court protected the retirement benefits of an embezzler and held that ERISA's nonalienation requirement "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." 493 U.S. at 370. A *fortiori*, ERISA's nonalienation requirement should protect the retirement benefits of a plan participant who has fallen on hard times. In *Guidry*, this Court held that ERISA's antialienation provision meant what it said: "We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case," 493 U.S. at 372. Similarly, we see no meaningful distinction between a writ of garnishment and a turnover order under Bankruptcy Code Section 542, demanding that a pension plan fiduciary make plan assets available for the benefit of a participant's creditors in violation of ERISA Sections 206(d)(1) and 404(a)(1)(A) and in violation of the parallel provision in the Internal Revenue Code, *i.e.*, Section 401(a)(13)(A).

The Internal Revenue Service also sees no meaningful distinction with respect to a decision to alienate participant's pension benefits: "It is the view of the Internal Revenue Service that [Internal Revenue Code] Section 401(a)(13) provides, at this time, the exclusive and definitive law on alienability of pension benefits in bankruptcy proceedings." P.L.R. 9109051 (Dec. 5, 1990).[3]

[3] Although IRS private letter rulings may not be used as precedent, *see* I.R.C. § 6110(j)(3), those rulings are entitled to some

See P.L.R. 8910035 (Dec. 9, 1989). The Internal Revenue Service, in P.L.R. 9109051 (Dec. 5, 1990), takes the position that compliance with a Bankruptcy Code Section 542 order from a trustee in bankruptcy to turn over the value of a participant/debtor's interest in a pension plan will result in disqualification of the plan due to noncompliance with I.R.C. § 401(a)(13).

Treas. Reg. § 1.401(a)-13(c)(1)(ii) provides that "assignment and alienation" include any direct or indirect arrangement under which a party acquires from a participant "a right or interest enforceable against the plan in . . . any part of a plan benefit payment which is, or may become, payable to the participant. . . ." *Id.* In reaching its conclusions, the Internal Revenue Service relies on the legislative history of the antialienation provision, which states that its purpose is to protect pension benefits "against the claims of general creditors," P.L.R. 9109051, *citing*, H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 280 (1974), and to "further ensure that the employee's accrued benefits are actually available for retirement purposes," H. Rep. No. 807, 93d Cong., 2d Sess. 68 (1974).

Finally, we note that the legislative history of the Bankruptcy Reform Act lists "*some* of the items that may be exempted [from the debtor's estate] under Federal laws other than title II. . . ." *Id.*, S. Rep. No. 989 at 75. The list includes the Social Security Act, the Railroad Retirement Act, the Civil Service Act, and the Veterans' Benefit Act. This Court listed those same federal laws in holding that ERISA is "consonant with other statutory provisions designed to safeguard retirement income." *Guidry*, 493 U.S. at 372.

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weight. *Amato v. Western Union International*, 773 F.2d 1402 (2d Cir.) *cert. dismissed*, 474 U.S. 1113 (1985). *Compare Jewett v. Commissioner*, 455 U.S. 305, 318 (1982) (consistent interpretation of Internal Revenue Code by Commissioner is entitled to "respect").

CONCLUSION

Based on the foregoing, the American Society of Pension Actuaries respectfully urges the Court to affirm the decision below and ensure that retirement plan assets provide retirement benefits.

Respectfully submitted,

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